

10

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 26

THE UNITED STATES FIDELITY AND GUARANTY COMPANY OF BALTIMORE, MARYLAND, PLAINTIFF IN ERROR,

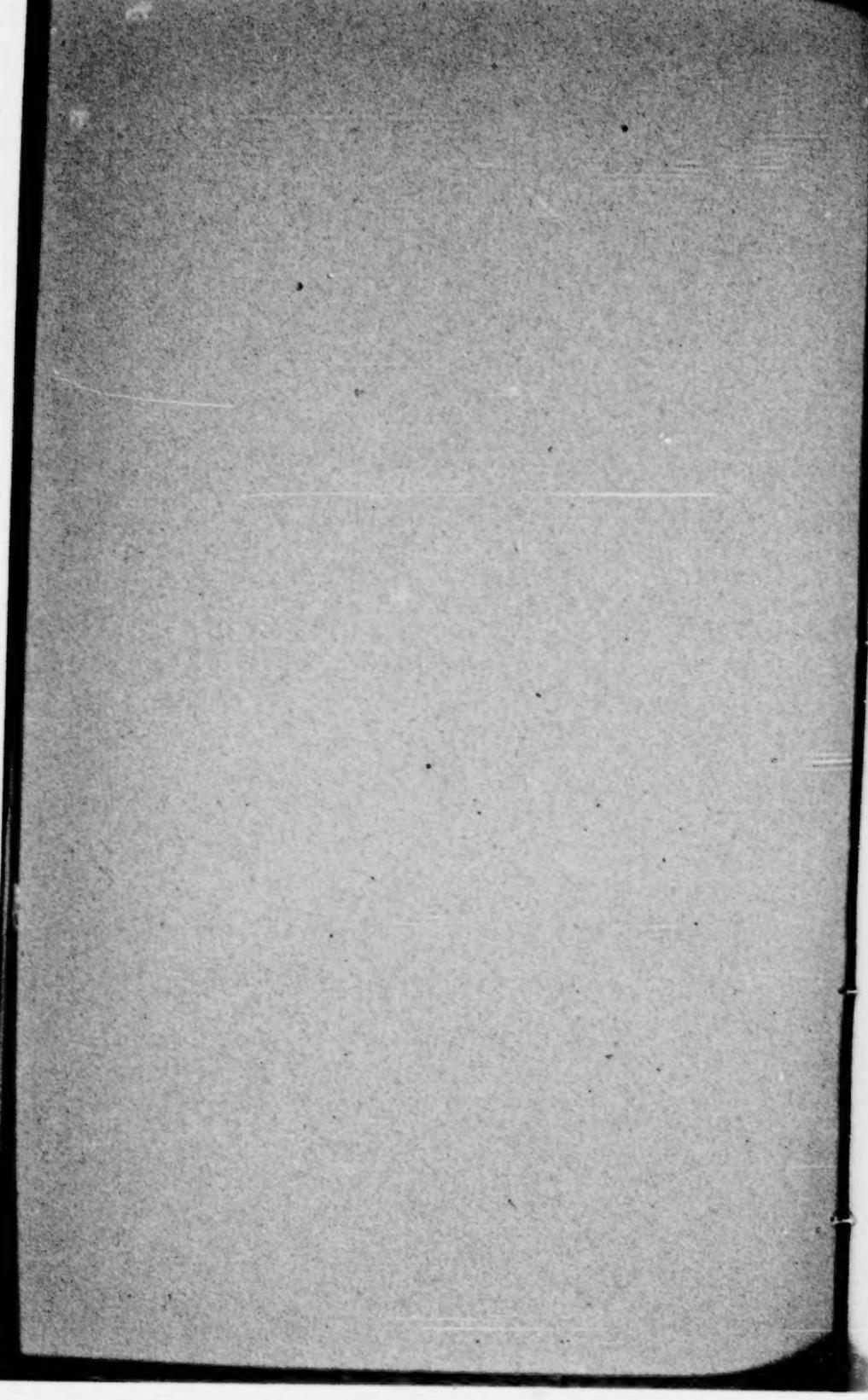
vs.

THE COMMONWEALTH OF KENTUCKY.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

FILED MARCH 3, 1911.

(22,556)



(22,556)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 237.

THE UNITED STATES FIDELITY AND GUARANTY COMPANY OF BALTIMORE, MARYLAND, PLAINTIFF IN ERROR,

vs.

THE COMMONWEALTH OF KENTUCKY.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

INDEX.

| | Original. | Print |
|--|-----------|-------|
| Caption..... | 1 | 1 |
| Transcript from Mason circuit court..... | 3 | 1 |
| Caption..... | 3 | 1 |
| Indictment | 4 | 1 |
| Order for summons | 5 | 2 |
| Summons and sheriff's return..... | 5 | 2 |
| Order filing demurrer to indictment..... | 6 | 3 |
| Demurrer to indictment..... | 6 | 3 |
| Order filing special plea and answer..... | 6 | 3 |
| Special plea and answer..... | 6 | 3 |
| Order overruling demurrer to indictment..... | 8 | 4 |
| Order filing demurrer to special plea..... | 8 | 4 |
| Demurrer to special plea..... | 8 | 4 |
| Order sustaining demurrer to special plea..... | 8 | 4 |
| Order appointing stenographer..... | 8 | 5 |
| Order impaneling jury, &c..... | 9 | 5 |
| Verdict of jury and judgment..... | 9 | 5 |
| Order filing motion and grounds for a new trial..... | 10 | 5 |
| Motion and grounds for a new trial..... | 10 | 5 |
| Order overruling motion for a new trial..... | 10 | 6 |

| | Original. | Print |
|--|-----------|-------|
| Order tendering bill of exceptions..... | 11 | 6 |
| Order filing bill of exceptions..... | 11 | 6 |
| Bill of exceptions..... | 11 | 6 |
| Testimony of Frank P. O'Donnell..... | 11 | 6 |
| Defendant's request for instructions..... | 17 | 10 |
| Instructions given..... | 18 | 10 |
| Judge's certificate to bill of exceptions..... | 19 | 11 |
| Clerk's certificate to transcript..... | 19 | 11 |
| Index to transcript..... | 20 | 11 |
| Statement..... | 21 | 11 |
| Order submitting case..... | 22 | 12 |
| Judgment..... | 23 | 12 |
| Opinion..... | 24 | 13 |
| Petition for writ of error..... | 44 | 21 |
| Assignment of errors..... | 47 | 22 |
| Writ of error..... | 51 | 23 |
| Order allowing writ of error..... | 53 | 24 |
| Writ of error bond..... | 55 | 25 |
| Original citation..... | 58 | 26 |
| Certificate to transcript..... | 59 | 27 |

1 THE COMMONWEALTH OF KENTUCKY:

The Court of Appeals.

UNITED STATES FIDELITY & GUARANTY COMPANY, Appellant,
vs.
COMMONWEALTH OF KENTUCKY, Appellee.

Appeal from Mason Circuit Court.

Pleas Before the Honorable the Court of Appeals of Kentucky, at the Capitol, in Frankfort, on the Dates Hereinafter Mentioned.

2 Be it remembered that on the 29th day of October, 1909,
the appellant, by its attorney, filed in the office of the Clerk
of the Court of Appeals, a transcript of the record, which is in words
and figures as follows:

3 STATE OF KENTUCKY,
Mason Circuit Court:

Pleas Before the Honorable James P. Harbeson, Judge of the
Mason Circuit Court, at the Court House Thereof, in the City
of Maysville, Ky., on the 10th Day of September, 1909,

Mason Circuit Court,

THE COMMONWEALTH OF KENTUCKY, Plaintiff,
against

UNITED STATES FIDELITY AND GUARANTY COMPANY, Defendant.

Indictment for Having Representatives in this State Doing a Credit
Reporting Business Without License.

Be it remembered that heretofore to-wit, on the 31st day of
March, 1909, the Grand Jury of Mason County, returned into court
the following Indictment endorsed on the back thereof, "The Com-
monwealth of Kentucky, against United States Fidelity & Guaranty
Company," Indictment for "Having representatives in this State
doing a credit reporting business without license" "A True Bill,
John M. Chambers, "Foreman," which was ordered to be filed, and
is in the following words to-wit:

4 *Indictment.*

The Grand Jury of Mason County, in the name and by the au-
thority of the Commonwealth of Kentucky, accuse "United States
Fidelity and Guaranty Company, a corporation created and exist-
ing under the laws of the State of Maryland, United States of Amer-

ten, of the offense of Having and keeping representatives in this State engaged in the business of inquiring into and reporting upon the credit and standing of persons engaged in business in this State, without license so to do, committed as follows, viz. The said United States Fidelity & Guaranty Company, on the — day of — 1869, and other days before and since, within twelve months last past, and before the finding of this Indictment in the County aforesaid, did unlawfully willfully and knowingly employ and keep representatives and agents, to-wit A. D. Cole and F. P. O'Donnell, in said county and State of Kentucky, engaged and employed in the business of inquiring into and reporting upon the credit and standing of persons engaged in business in said Mason County, Kentucky, and that said representatives and agents, as representatives and agents of said United States Fidelity and Guaranty Company, during all times mentioned herein, inquired into and reported upon the credit and standing of divers persons, whose names are unknown to the grand jury, engaged in business in said County and State, during said time, and all of which was so done by said corporation and said A. D. Cole and F. P. O'Donnell, who were at all times aforesaid the authorized, engaged and employed representatives, agents and correspondents of the said corporation and engaged and employed as such by said corporation, in carrying on said business of inquiring into and reporting upon the credit and standing of said persons engaged in business in said county and State and all of which said inquiring and reporting aforesaid, was done by said representatives and agents of said corporation, with its knowledge, direction and consent and all of which was so done as aforesaid by the said United States Fidelity and Guaranty Company and the said A. D. Cole and F. P. O'Donnell, without license so to do, contrary to law and against the peace and dignity of the Commonwealth of Kentucky.

MATTHEW J. HENNESSEY,
Commonwealth's Attorney.

(At a Court begun and held for the Mason Circuit Court on the 21st day of March, 1869.)

Order for Summons.

Ordered that summons issue against the defendant on the indictment herein.

Summons (Summons on Indictment).

Mason Circuit Court.

THE COMMONWEALTH OF KENTUCKY:

To any Sheriff, Constable, Coroner, Jailer, Marshal or Policeman in this State:

You are hereby commanded to summons United States Fidelity and Guaranty Company, to appear in the Mason circuit court, on the

first day of its next September term, 1909, to answer an Indictment for misdemeanor found against it in that court.

Given under my hand as Clerk of said Court, this 11th day of August, 1909.

ISAAC WOODWARD, C. M. C. C.

6

Sheriff's Return.

Executed Aug. 21st, 1909 at Maysville, Kentucky, on the United States Fidelity and Guaranty Company, by delivering to each Harry L. Walsh and Allen D. Cole a true copy of the within summons they being the agents of said Company in Mason County.

JAMES MACKEY, S. M. C.

(At a Court held as aforesaid on the 6th day of September 1909.)

Order Filing Demurrer.

Defendant produced its demurrer to the Indictment herein, which is ordered to be filed.

Demurrer.

The defendant, The U. S. Fidelity and Guaranty Company, demurs to the indictment herein, because the same does not state facts sufficient to constitute a cause of action or any offense against it. Wherefore defendant prays to be sent hence with judgment for its costs and all proper relief.

A. D. COLE,
Atty for Dft

(At a Court held as aforesaid the day and year aforesaid.)

Order Filing Special Plea and Answer.

Defendant also produced its Special plea and answer to the indictment herein, which is ordered to be filed.

Special Plea and Answer.

Not waiving either its general demurrer or its general plea of not guilty, the defendant, The U. S. Fidelity and Guaranty Co., for special plea and answer to the indictment herein, states that it is a corporation created, organized and existing under and by virtue of the laws of the State of Maryland; that at all times herein mentioned, it has been engaged, pursuant to its charter, in the publication and distribution of a list of selected attorneys in the United States which it has for a consideration furnished to business men and merchants throughout the United States to

enable them to transact and carry on business between the states of this Union; that under its method of business, its designated attorneys of Maysville, Ky., have through the United States mail, received inquiries from and made report to merchants residing outside this Commonwealth with reference to the financial standing of merchants residing in the City of Maysville and Mason County as well as at Aberdeen, Brown County, Ohio; that the inquiries so received and so furnished to said merchants and business men outside the State of Kentucky have been used by them as an incident to the carrying on of their said business and commerce between the states of this Union; and that the purpose of the organization of defendant Company and the granting of the rights and privileges to it as aforesaid was to enable it to be, and said defendant is, now and was at all times herein mentioned, in fact, an instrument to promote, facilitate and carry on commerce between the states of this Union; and that the offenses for which it has been indicted herein are and were matters and things done by it and its said agents under and pursuant to its said charter in promoting and facilitating commerce between the states of this Union.

Defendant therefore states that the act of the Legislature of Kentucky pursuant to which the Indictment herein was drawn is and was in conflict with Sec. 8, Sub. Sec. 3 of the Constitution of the United States, which it now pleads and relies upon in bar of this Indictment and that the provisions of said act are therefore null and void as to this defendant.

Wherefore defendant prays to be sent hence with judgment for its costs and all proper relief.

A. D. COLE,
Attorney for Defendant.

(At a court held as aforesaid on the 9th day of September 1909 the following orders were entered.)

Order Overrule Demurrer.

The Court having considered of defendant's demurrer to the Indictment herein, and being advised, overrules the same, to which defendant excepts.

Order Filing Demur to Special Plea.

Plaintiff produced her demurrer to defendant's special plea herein, which is ordered to be filed.

Demurrer to Special Plea.

Now comes the plaintiff, the Commonwealth of Kentucky and demurs to the defendant's special plea herein, because same does not state facts sufficient to constitute a defense to the indictment herein.

M. J. HENNESSEY,
Commonwealth's Attorney.

Order Sustaining Demur.

The Court having considered thereof, and being advised, sustains the demurrer, to which defendant excepts.

Ordered that Miss Bessie Johnson, official stenographer of this court be, and she is hereby directed to take full stenographic notes of the testimony herein.

(At a court held as aforesaid the day and year aforesaid.)

Order Empanelling Jury, &c.

This day came the defendant and plead not guilty to the offense charged in the indictment, thereupon came the following jury, viz: L. H. Jenkins, L. N. Strode, William Rosser, Asbury Curtis, L. K. Parry, Alex Duke, W. H. Yancey, Elmer Downing, Walker Forman, Ben Marshall, Thos. Crawford and G. A. Collins, who were duly empanneled and sworn to try the issue; at the conclusion of plaintiff's testimony, defendant moved the court to instruct the jury to find the defendant not guilty, the court overruled said motion, to which defendant excepts. The jury aforesaid having fully heard the evidence returned the following verdict:

Verdict.

"We the jury find the defendant guilty and fix the penalty in the sum of (\$150.00) One hundred and fifty dollars,

L. K. PERRY, Foreman."

Judgment.

Wherefore it is adjudged that the Commonwealth of Kentucky, recover of the defendant, the sum of One hundred and fifty dollars with interest thereon from September 9th, 1909 until paid and her costs herein expended.

(At a court held as aforesaid on the 10th day of September 1909.)

10 *Order Filing Motion for New Trial.*

Defendant comes and moves the court to set aside the verdict and judgment rendered herein on a former day of the present term, and grant it a new trial of this action, and produced its reasons in writing therefor, which are ordered to be filed.

Motion and Grounds for a New Trial.

The defendant, The United States Fidelity and Guaranty Company, moves the court to set aside the verdict and judgment rendered herein, and grant it a new trial on the following grounds:

- 1st. The court erred to the prejudice of defendant in not granting its motion for a peremptory instruction.
- 2nd. The court erred to its prejudice in giving instructions Nos. 1 and 2 on motion of the Commonwealth of Ky.
- 3rd. The verdict is not sustained by the evidence and is contrary to law.

Wherefore, &c.

A. D. COLE,
Att'y for Defendant.

Order Overrule Motion, &c., for a New Trial.

The Court having considered thereof, overrules said motion, and the defendant excepts, and prays an appeal to the Court of Appeals, which is granted.

On motion of defendant, time up to and including the 10th day of the next term of this court, is given it to prepare and file its Bill of Exceptions herein.

(At a court held as aforesaid on the 25th day of Sept. 1909.)

11 *Order, Tender — Bill of Exceptions.*

This day defendant produced and tendered to the court its certain bill of exceptions herein; and moved the court to sign and seal the same and order it to be filed and made a part of the record; but on motion of the plaintiff further time is given it to examine and complete same.

(At a court held as aforesaid on the 14th day of October 1909.)

Order Filing Bill of Exceptions.

This day came the defendant and produced its certain Bill of Exceptions herein, heretofore tendered to the court, and the court having examined, signed and sealed the same, and ordered it to be filed and made a part of the record.

Bill of Exceptions.

Be it remembered that at the September term, 1909, of the Mason Circuit Court the above styled cause came up to be heard and plaintiff to support the issue on its part introduced the following witnesses.

The witness, FRANK P. O'DONNELL, having been first duly sworn, testified as follows:

Q. 1. Were you an agent and representative of the United States Fidelity and Guaranty Co., during the year prior to last March, or March of this year?

Ans. Yes sir, I was one of its guaranteed attorneys.

Q. 2. During that year prior to March 31st, 1909?

Ans. Yes sir, I was one of their guaranteed attorneys in and for this County.

Q. 3. The United States Fidelity & Guaranty Co. is a 12 Maryland Corporation, Isn't it?

Ans. I am so informed. I never saw the act incorporating it.

Q. 4. It is conceded that it is a Corporation, is it?

Ans. Yes sir, I suppose so.

Q. 5. Have you the contract that you made with them that year?

Ans. I have it, I have not been able to locate it.

Q. 6. Have you tried to locate it?

Ans. Yes sir.

Q. 7. State the substance of the contract you had with them in regard to the reporting upon the credit and standing of persons engaged in business in Maysville, Mason County, Kentucky?

Ans. My recollection is that I assumed the obligation to diligently and faithfully and truthfully report on persons, their credit and character for reliability, etc., which might be sought by merchants elsewhere or in the State.

Q. 8. Subscribers of that Company?

Ans. Yes sir, on the blanks furnished by the Company and not on anything else but those blanks.

Q. 9. What was the nature of those blanks in regard to the subscribers being entitled to your services as agent or correspondent for the Company?

Ans. I think that would be a matter between the subscribers and the Company, but I understood it would be my duty to furnish them with reports of persons desired.

13 Q. 10. That is, there is attached to those reports sent in by subscribers this form. "The enquirers and subscribers herein having complied with their contract with the United States Fidelity & Guaranty Co. are entitled to the services of its agents and correspondents in making credit reports up to a certain date or during a certain year."

Ans. I think they have attached to each report some such perforated slip.

Q. 11. Saying the enquirer and subscriber is entitled to a report from you as to the standing of persons engaged in business in Mason County and other Counties in the State?

Ans. Yes sir, until a certain date, that is correct.

Q. 12. As a consideration for your making those reports, was or not your name inserted in The Guaranteed Attorneys Quarterly, published by the United States Fidelity & Guaranty Company?

Ans. I don't know whether or not it was in consideration of that fact, but I know my name was inserted in the Quarterly report as one of the agents of this locality.

Q. 13. I will ask you in regard to that Guaranteed Quarterly report of the Guaranteed Attorneys Quarterly, if the blank I hand you was not one of those it used.

Ans. Yes sir, that is one of the last issue, July, 1909.

Q. 14. Is that for the year or quarter?

Ans. For the quarter ending July, 1909.

Q. 15. Is that the same kind of Quarterly as those you were receiving before that during the contract?

Ans. Yes sir, it is substantially the same. I presume there are some changes of names here and there, which I didn't seek to verify.

Q. 16. On page No. 7 under the title "Scope of the Department of Guaranteed Attorneys," please read section 2.

Ans. Section 2 is as follows: "To make prompt reports free of charge to said subscriber, but only when requested for same is accompanied by the Department's usual form of inquiry blank, upon persons engaged in any branch of trade in the City or town and vicinity where the undersigned is located. Such reports to be as full and comprehensive as can be made upon a reasonable investigation of the person or persons inquired about. Under no circumstances will the undersigned reveal the name or address of the inquirer to the person or persons upon whom the inquiry is made."

Q. 17. That was the agreement that you were working under with them?

Ans. I think that is the agreement.

Q. 18. During those twelve months prior to March 30th, did you or not in pursuance of that agreement and as agent and representative and correspondent of the United States Fidelity & Guaranty Company make report on the credit and standing of divers persons engaged in business in the County of Mason, this State?

Ans. I did.

Q. 19. You are located in Mason County, and were the agent for Mason County, Ky.

Ans. Mr. Cole and myself were the agents for Mason County in that Department, yes sir.

Q. 20. What was there in regard to an agreement for you to pay the Company anything?

Ans. There was a consideration paid for representation.

Q. 21. And for that consideration paid you had your name inserted?

Ans. That was not the inducement with me, at least; the inducement was to get the business.

Q. 22. Of being their attorney?

Ans. Yes sir.

Q. 23. And for that consideration paid to them you had your name inserted in the Quarterly?

Ans. I don't know whether it was in consideration of that fact, but the fact is it was inserted.

Q. 24. What territory were you confined to as agent and correspondent for this Company?

Ans. I think I sometimes got reports on persons in Mason County and some few in Lewis, and sometimes persons in Brown County, Ohio, but I don't think I ever received any on persons in Bracken County.

Q. 25. Did your contract provide what territory you could operate in?

Ans. I think the contract indicated the names of the towns that I was to act in.

Q. 26. Did you or not make those credit reports directly to the Guaranty Co., and by subscribers sending you in blanks saying they were subscribers of the Company and entitled to such reports.

Ans. All or our business was done directly with the subscribers who were generally merchants who sought to know the standing of local merchants.

16. Q. 27. Did your contract show you did it for all the towns in Mason County of any size, Maysville, etc.?

Ans. I think practically all of the towns in the County, if not all of them.

Q. 28. During the time aforesaid, you were all that time an authorized agent and representative of said Company in this County, that is one of them, for the purpose of making these credit reports?

Ans. Yes sir I was one of the agents for that purpose.

Cross-examination:

Q. 1. From whom did you receive "communications with reference to the financial standing of merchants in Mason County and adjacent territory?"

Ans. From divers persons. I could not now, I believe recall a single person, and under my contract, I would not be permitted to reveal the person by whom information was sought.

Q. 2. I am not asking for the names of the parties, but where did they live?

Ans. I think they, in every instance, lived outside the State of Kentucky, some in Ohio, some in New York, some in Missouri and some in pretty much every State in the Union.

Q. 3. In your relation to the Company and to those merchants, did you receive any business from them or conduct any business in their behalf between them and merchants here?

Ans. Yes sir.

17. Q. 4. Was or not the purpose of your client, the United States Fidelity and Guaranty Co., to promote or facilitate business relations and commerce between the citizens of the other states in the Union and citizens of the State of Kentucky and County of Mason where you had particular jurisdiction as attorney?

Ans. I think entirely so.

Redirect examination:

Q. 1. During that time when you received these reports, these credit blanks, did these credit blanks show on them that this Company had a license so to do; did you receive same with a statement on the letter head of these forms saying the Company had a license to do this business?

Ans. I don't know whether or not that was on there, or whether

it was absent from there. I generally got those reports out of my way as quickly as possible and didn't read the fine print on them.

And further saith not Frank P. O'Donnell.

The plaintiff then concluded its testimony; and thereupon the defendant moved the court to instruct the jury to find it not guilty; which instruction is as follows: "The defendant The United States Fidelity & Guaranty Company moves the court to instruct the jury to find the defendant not guilty." To the giving of this instruction, the plaintiff objected, its objection was sustained and said instruction refused; to which ruling of the court, the defendant at the time excepted.

18. The court on its own motion gave instructions No. 1 and 2, which are as follows:

Instruction No. 1.

The court instructs the jury that if they believe from all the evidence beyond a reasonable doubt that the defendant at — time during the twelve months prior to the finding of the indictment herein in this county, willfully and knowingly employed and kept an agent or representative engaged and employed in the business of inquiring into and reporting upon the credit and standing of persons engaged in business in said Mason County, Kentucky, and that said agent or representative during said time inquired into and reported upon the credit and standing of divers persons engaged in business in said county, as such agent or representative and in pursuance of said employment and said defendant at the time was without license so to do, will find the defendant guilty as charged in the indictment and fix its punishment at a fine in any sum not less than \$50.00 nor more than one thousand dollars, in their discretion.

Instruction No. 2.

Unless the jury believe from all the evidence beyond a reasonable doubt that the defendant has been proven guilty they should find it not guilty.

19. To the giving of this instruction, the defendant objected, but the objection was overruled and defendant at the time excepted.

The foregoing instructions are the only ones that were offered or refused or given.

Then came the defendant and tendered this, its Bill of Exceptions, which having been examined and approved by the Judge, is ordered to be filed and made a part of the record without being spread on the order book.

JAS. P. HARBESEN,
Judge Mason Ct. Ct.

STATE OF KENTUCKY,

Mason Circuit Court, set:

I, Isaac Woodward, Clerk of the Mason circuit court, do hereby certify that the foregoing and annexed 15 pages contain a full, true and complete transcript of the record and proceedings had in said court in the case therein mentioned.

Witness my hand this 15th day of October, 1909.

Fee for record \$4.50.

ISAAC WOODWARD, *Clerk.*

20

Index.

| | |
|--|-----------|
| Indictment | page 4 |
| Order for Summons..... | page 5 |
| Summons and Sheriff's return..... | page 5, 6 |
| Order filing demurrer to the indictment..... | page 6 |
| Demurrer to the indictment..... | page 6 |
| Order filing Special plea and Answer..... | page 6 |
| Special plea and Answer..... | page 6 |
| Order overrule- demurrer to Indictment..... | page 8 |
| Order filing demurrer to Special plea..... | page 8 |
| Demurrer to Special plea..... | page 8 |
| Order sustain- demurrer to special plea..... | page 8 |
| Order appoint- stenographer..... | page 8 |
| Order empaneling jury &c..... | page 9 |
| Verdict of jury and judgment..... | page 9 |
| Order filing motion and grounds for a new trial..... | page 10 |
| Motion and grounds for a new trial..... | page 10 |
| Order overrules motion for a new trial..... | page 10 |
| Order tender- Bill of Exceptions..... | page 11 |
| Order filing Bill of Exceptions..... | page 11 |
| Bill of Exceptions..... | page 11 |

21

Kentucky Court of Appeals.

U. S. FIDELITY & GUARANTY CO., Appellant

vs.

COMMONWEALTH OF KENTUCKY, Appellee.

Statement.

(1.)

U. S. Fidelity & Guaranty Co., a corporation of Baltimore, Md., is appellant.

(2.)

Commonwealth of Kentucky is appellee.

(3.)

The judgment appealed from was rendered by the Mason Circuit Court on the 9th day of September 1909, and may be found on Page 6 of the record.

(4.)

No summons is desired as an appeal was granted by the lower court.

(5.)

The name of the attorney for appellee is M. J. Hennessey, whose residence is Augusta, Ky.

ALLAN D. COLE,
Atty for Appellant.

22. Be it remembered that on the 3rd day of January, 1910, at a Court held at the Capitol, in Frankfort, the following order was entered.

U. S. FIDELITY & GUARANTY CO.

v.

COMMONWEALTH.

Mason.

The foregoing case is ordered submitted.

23. Be it remembered that on the 9th day of June, 1910, at a Court of Appeals held at the Capitol, in Frankfort, the following judgment was entered:

UNITED STATES FIDELITY & GUARANTY COMPANY, Appellant.

v.

COMMONWEALTH, Appellee.

Appeal from Mason Circuit Court.

The Court being sufficiently advised, it seems to them there is no error in the judgment herein.

It is therefore considered that said judgment be affirmed, which is ordered to be certified to said court. (Whole court sitting. Chief Justice Barker, dissenting.)

It is further considered that appellee recover of appellant its costs herein.

And on said date the Court delivered the following opinion:

24

Court of Appeals of Kentucky.

June 9, 1910.

UNITED STATES FIDELITY & GUARANTY COMPANY, Appellant,
vs.

THE COMMONWEALTH OF KENTUCKY, Appellee.

Appeal from Mason Circuit Court.

Opinion of the Court by Judge Carroll.

(To be reported.)

The question in this case is—was the appellant company at the time of its indictment and conviction engaged in the business of interstate commerce and consequently exempt from the operation of section 1224 of the Kentucky Statutes providing in part that—

“Each and every person, partnership or corporation having representatives in this State, who engage in the business of inquiring into and reporting upon the credit and standing of persons engaged in business in this State, shall pay a license tax of one hundred dollars.”

25 The appellant company was indicted for failing to pay the license tax demanded by the statute, and upon a trial under the indictment was fined \$150.00.

Heretofore, the Commonwealth proceeded by penal action against the appellant company to recover the penalty denounced for failure to comply with the provisions of the statute in reference to paying a license tax, and from a judgment finding it guilty it prosecuted an appeal to this Court. In the opinion, which may be found in 118 S. W., 1000, we held that the company was engaged in the business of inquiring into and reporting upon the credit and standing of persons engaged in business in this State and hence liable for the tax. In that case the only defense made was that the business it was engaged in did not fall within the scope or meaning of the statute. Upon that feature of the case we are satisfied with the correctness of the conclusion reached in the former case. So that the only question now open is, was the business the company engaged in interstate commerce within the meaning of section 8 of the Federal constitution providing

“The Congress shall have power * * * to regulate commerce with foreign nations, and among the several States, and with the Indian tribes?”

For the purpose of clearly presenting the question, we will 26 state so much of the indictment, special plea and evidence as may be necessary to an understanding of it. The indictment charges that the company

“did unlawfully, wilfully and knowingly employ and keep representatives and agents, to-wit, A. D. Cole and F. P. O'Donnell, in

said county and State of Kentucky, engaged and employed in the business of inquiring into and reporting upon the credit and standing of persons engaged in business in said Mason county, Kentucky; and that said representatives and agents, as representatives and agents of said United States Fidelity & Guaranty Company, during all times mentioned herein, inquired into and reported upon the credit and standing of divers persons, whose names are unknown to the grand jury, engaged in business in said County and State, during said time, and all of which was so done by said corporation and said A. D. Cole and F. P. O'Donnell, who were at all times aforesaid, the authorized, engaged and employed representatives, agents and correspondents of the said corporation and engaged and employed as such by said corporation, in carrying on said business of inquiring into and reporting upon the credit and standing of persons engaged in business in said county and State and all of which said inquiring and reporting aforesaid, was done by said representatives and agents of said corporation, with its knowledge, direction and consent and all of which was so done as aforesaid by the said

27 United States Fidelity & Guaranty Company and the said A. D. Cole and F. P. O'Donnell, without license so to do, contrary to law and against the peace and dignity of the Commonwealth of Kentucky."

To this indictment the company in addition to its general plea of not guilty, interposed the following special plea:

"It states that it is a corporation created, organized and existing under and by virtue of the laws of the State of Maryland; that at all times herein mentioned, it has been engaged, pursuant to its charter, in the publication and distribution of a list of selected attorneys in the United States which it has for a consideration furnished to business men and merchants throughout the United States to enable them to transact and carry on business between the States of this Union; that under its method of business, its designated attorneys at Maysville, Ky., have through the United States mail, received inquiries from and made report to merchants residing outside this Commonwealth with reference to the financial standing of merchants residing in the city of Maysville and Mason county as well as at Aberdeen, Brown County, Ohio; that the inquiries so received and so furnished to said merchants and business men outside the State of Kentucky have been used by them as an

28 incident to the carrying on of their said business and commerce between the States of this Union; that the purpose of the organization of defendant company and the granting of the rights and privileges to it as aforesaid was to enable it to be, and said defendant is, now and was at all times herein mentioned, in fact, an instrument to promote, facilitate and carry on commerce between the States of this Union; and that the offences for which it has been indicted herein are and were matters and things done by it and its said agents under and pursuant to its said charter in promoting and facilitating commerce between the States of this Union.

Defendant therefore states that the act of the Legislature of Ken-

tucky pursuant to which the indictment herein was drawn is and was in conflict with section 8, sub-section 3 of the Constitution of the United States, which it now pleads and relies upon in bar of this indictment and that the provisions of said act are therefore null and void as to this defendant."

Frank P. O'Donnell, the agent of the company at Maysville, testified in part—

"Q. State the substance of the contract you had with them in regard to the reporting upon the credit and standing of persons engaged in business in Maysville, Mason County, Kentucky?"

29 A. My recollection is that I assumed the obligation to diligently and faithfully and truthfully report on persons, their credit and character for reliability, etc., which might be sought by merchants elsewhere or in the State."

He further said it was his duty under the agreement with the company—

"To make prompt reports free of charge to said subscriber, but only when request for same is accompanied by the Department's usual form of inquiry blank, upon persons engaged in any branch of trade in the city or town and vicinity where the undersigned is located. Such reports to be as full and comprehensive as can be made upon a reasonable investigation of the person or persons inquired about. Under no circumstances will the undersigned reveal the name or address of the inquirer to the person or persons upon whom the inquiry is made.

Q. During these twelve months prior to March 30th, did you or not in pursuance of that agreement and as agent and representative and correspondent of the United States Fidelity & Guaranty Company make report on the credit and standing of divers persons engaged in business in the County of Mason, this State?"

A. I did.

Q. You are located in Mason County, and were the agent for Mason County, Kentucky?"

30 A. Mr. Cole and myself were the agents for Mason county in that Department, yes, sir.

Q. What was there in regard to an agreement for you to pay the company anything?

A. There was a consideration paid for representation.

Q. And for that consideration paid you had your name inserted?

A. That was not the inducement with me, at least; the inducement was to get the business.

Q. Of being their attorney?

A. Yes, sir.

Q. And for that consideration paid to them, you had your name inserted in the Quarterly?

A. I don't know whether it was in consideration of that fact, but the fact is it was inserted.

Q. Did you or not make those credit reports directly to the Guaranty Company, and by subscribers sending you in blanks saying they were subscribers of the company and entitled to such reports?

A. All of our business was done directly with the subscribers who

were generally merchants who sought to know the standing of local merchants.

Q. From whom did you receive communications with reference to the financial standing of merchants in Mason county and adjacent territory?

A. From divers persons. I could not now I believe recall a single person, and under my contract I would not be permitted to reveal the person by whom information was sought."

In brief, the agreement or arrangement between the appellant company and its attorney was that the appellant company in consideration of the fee paid to it by attorneys throughout the country, inserted their names in books issued by it, and guaranteed merchants and other persons sending to these attorneys' claims, that they would promptly and faithfully pay over all money collected. It also furnished merchants and other persons for a consideration its list of guaranteed attorneys, and provided the attorneys and subscribers with blank forms upon which information respecting the financial standing of persons whom the subscribing merchant desired to deal with might be furnished by the attorney. The attorneys when requested answered such inquiries concerning the business and commercial standing of persons, as subscribing members to the list of guaranteed attorneys desired. These attorneys did not make any reports to the guaranty company, but sent their reports direct to the firm or person making the inquiry.

We will now proceed to inquire whether or not the appellant company through the agency of these Maysville attorneys was engaged in this State in interstate commerce. If it was, the judgment must be reversed with directions to dismiss the prosecution, as there is of course no room to doubt that the State cannot levy a tax upon

32 persons or things engaged in carrying on interstate commerce.

In the consideration of this question, which involves an attempt to make what seems to us a new application of the commerce clause of the Constitution, we will confine ourselves in the citation of authority to the opinions of the Supreme Court of the United States as the final construction and application of this clause of the Constitution is entirely the result of the opinions of that court. In the multitude of cases on this subject decided by the Supreme Court, beginning in 1824 with *Gibbons v. Ogden*, 9 Wheat, 1, 6 L. ed. 23, and ending with the *International Text Book Company v. Pigg*, handed down April 4, 1910, we have not found any case that extends as far the law applicable to interstate commerce as we are asked to go in this case.

As we understand interstate commerce, excluding its application to persons as not pertinent to the matter under consideration, the essential and indispensable element in it is the transportation of property or intelligence from one State into another. It embraces not only the property or intelligence thus sent, but the physical agencies, such as railroad, express and telegraph companies engaged in the commerce, and their employees, as well as all persons who are directly connected as principals or agents in carrying on the business, except that as applied to intelligence it does not include every

person who writes a letter or sends a message, being confined to those persons through whose agency or instrumentality the intelligence desired to be sent is conveyed and those persons who send or exchange intelligence as an essential part of a business they are engaged in and that directly results in the transportation of property. And it is not competent for the State to place any burden or restraint in the way of taxation or otherwise upon any of the articles or things that are the subject of interstate commerce or upon any agency or instrumentality that assists directly or immediately in carrying it on. In other words, interstate commerce until it has acquired a *situs* or place of abode within the jurisdiction of a State has the unrestricted privilege of coming and going where it pleases. The constitution of the United States has extended to it the freedom of each State, and no State has the right to abridge in any way its freedom or to impose upon it any burden or restraint although the property used in carrying it on may be taxed in the State where it is located. With this general statement we will confine the scope of this opinion to the precise matter in hand, which is limited to the single inquiry whether or not the appellant company in the promotion of its business through these attorneys is an agency or instrumentality of interstate commerce. If it is, then it is necessarily due to the fact that its attorneys in gathering and forwarding information are directly or immediately connected with the transportation of property from one State into another. The opinions of the Supreme Court have never extended the application of the commerce clause to persons who had no direct relation to the business carried on but when they have sustained such relation it has been uniformly held that it was not competent for the State to impose on them any tax. Thus, it was held in *Crutcher v. Commonwealth of Kentucky*, 111 U. S., 47, 35 L. ed., 649,

34 that it was not within the power of the State to require the agent of an express company doing interstate business to obtain a license from the Auditor of the State. The Court saying—
"We have repeatedly decided that a State law is unconstitutional and void which requires a party to take out a license for carrying on interstate commerce, no matter how specious the pretext may be for imposing it. * * * No State has the right to lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the occupation or business of carrying it on, for the reason that taxation is a burden on that commerce and amounts to a regulation of it, which belongs solely to Congress."

And in *McCall v. People of the State of California*, 136 U. S., 101, 34 L. ed., 391, an ordinance was held invalid that imposed a license tax upon the agent of a railroad, whose duty it was to solicit passenger traffic over a road engaged in interstate commerce. In that case the Court said—

"The fact of intercourse and traffic embraces all the means, instrumentalities and places by and in which intercourse and traffic are carried on; and further still, comprehends the act of carrying

them on at these places and by and with these means. The subject matter of intercourse or traffic may be either things, goods, chattels, merchandise or persons. All these may therefore be regulated."

And so in *Roddins v. Taxing District of Shelby County*, 120 U. S. 489, 30 L. ed. 694, a statute of the State of Tennessee imposing upon "all drummers and all persons, not having a regular licensed house of business in the taxing district, offering for sale or selling goods, wares or merchandise therein, by sample", a license tax was held invalid in so far as it applied to drummers representing non-resident firms. In that case the Court said:

"A State cannot impose taxes upon persons passing through the State or coming into it merely for a temporary purpose, especially if connected with interstate or foreign commerce. * * * When goods are sent from one State to another for sale, or, in consequence of a sale, they become a part of its general property and amenable to its laws, provided that no discrimination be made against them

as goods from another State, and that they be not taxed by reason of being brought from another State but only taxed

in the usual way as other goods are. But to tax the sale of such goods or the offer to sell them before they are brought into the State is a very different thing and seems to us clearly a tax on interstate commerce itself."

Again, in *Caldwell v. State of North Carolina*, 187 U. S., 622, 47 L. ed. 336, an ordinance requiring the agent of a non-resident company to obtain a license before he delivered the goods previously sold by the company was held to be in violation of the commerce clause of the constitution.

In *Stockard v. Morgan*, 185 U. S., 27, 46 L. ed. 785, a statute of Tennessee imposing a tax upon merchandise brokers whose business was confined to soliciting orders within the State, as agents for non-resident factories, was declared to be in violation of the commerce clause of the federal constitution.

In *International Text Book Company v. Pigg*, *supra*, the facts were these. The text book company was a Pennsylvania corporation, carrying on what was known as a correspondence school. In the conduct of its business, "it prepared and published instruction papers, text books and illustrative apparatus for courses of study to be pursued by means of correspondence, and the forwarding from time to time of such publications and apparatus to students. The company employs local or traveling agents, called 'solicitors,' 'collectors' whose duties are to procure and forward to the company at Scranton from persons in a specified territory on blanks furnished

by it, applications for scholarships in its correspondence schools. * * * In conformity with the contract between

the company and its scholars, the scholarship and instruction papers, text books and illustrative apparatus called for under each accepted application are sent by the company from Scranton directly to the applicant, and instruction is imparted by means of correspondence through the mails between the company at its office in that city and the applicant at his residence in another State." The company

had a solicitor in Kansas, who had procured a number of students to take correspondence courses in the schools of the text book company. The question was whether or not the business in which the company was engaged was interstate commerce. In holding that it was, the Court among other things said—

"It involved, as already suggested, regular and practically continuous intercourse between the text book company located in Pennsylvania and its scholars and agents in Kansas and other States. That intercourse was conducted by means of correspondence through the mails with such agents and scholars. * * * More than that, this mode,—looking at the contract between the text book company and its scholars,—involved the transportation from the State where the school was located to the State in which the scholar resides, of books, apparatus and papers useful or necessary in the particular course of study the scholar is pursuing and in respect of which he is entitled from time to time by virtue of his contract to information and direction.

38. Intercourse of that kind between parties in different States,—particularly when it is in the execution of a valid contract between them,—is as much intercourse in the constitutional sense as intercourse by means of the telegraph. * * * If intercourse between persons of different States by means of telegraphic messages conveying intelligence or information is commerce among the States which no State may directly burden, or unnecessarily encumber, we cannot doubt that intercourse or communication between persons in different States by means of correspondence through the mails is commerce among the States within the meaning of the constitution, especially where, as here, such intercourse and communication really relate to matters of regular continuous business and to the making of contracts and the transportation of books, papers, etc., appertaining to such business."

These cases we think sustain the general statement heretofore made indicating the persons and things embraced within the meaning of the commerce clause. Now, let us see if the appellant company through its Maysville attorneys was so connected with the carrying on of commerce as to bring its acts within the protection of the federal constitution. That indirectly, remotely or incidentally the attorneys may have had some minor part in the importation of goods may be conceded, but this is not sufficient. They must have had some immediate or direct connection with the transportation of goods from one State to another. The attorneys making the reports were not the agents for either the buyer or seller in the sense that

39. goods or articles were bought or sold through their agency or instrumentality. The reports they furnished did not constitute any contract of bargain or sale, or indeed offer to make any such contract. They merely reported the financial standing of merchants concerning whom inquiries were made, and this ended their connection with the matter. The merchant to whom the report was made might or might not in the exercise of his pleasure sell goods to the person whose standing he ascertained. If a commercial transaction took place between the merchant whose standing was

reported and the merchant to whom the report was sent, it was due entirely to subsequent negotiations between them, with which the reporting attorney had nothing to do. It will thus be seen that these attorneys had no direct relation to or with anything that was the subject of commerce. They did not sell or offer to sell any goods, they did not deliver or offer to deliver any, they did not handle or in any way have the possession of my goods, they did not bring the baylor and the seller together, or have anything whatever to do with the transportation of articles or goods, and we are unable to perceive how it can be and under the broadest construction of the Commerce clause that the reports furnished by these attorneys were instrumentalities in facilitating or carrying on interstate commerce. As said in *Adams v. United States*, 208 U. S. 161, 59 L. ed. 136.

Manifestly, since such is prescribed for the conduct of interstate commerce in order to be within the competency of Congress under its power to regulate commerce among the States, must have some real or substantial relation to or connection with the commerce regulation. *Id. at 136.* To the same effect is *Hopkins v. United States*, 171 U. S. 578, 13 L. ed. 290.

The correspondence in which the Maysville attorneys furnished non-resident dealers with information was only desultory and occasional. It is doubtful if more than one letter was exchanged between these attorneys and their non-resident correspondent. The correspondence was not regular or continuous with any particular person as in the International Text-Pile Company case, nor was it followed as was the correspondence in that case by the making of any contract for the transportation of my goods between the parties to the correspondence. If the interstate commerce clause is extended to embrace the fact of this case, and is held to be applicable to persons who are engaged in transmitting the character of information or intelligence reported by the Maysville attorneys, there is virtually no limitation upon its reach, and there are few professional or business men of the State who cannot invoke its protection to save them from license taxes other imposed by the State or municipal governments. Perhaps there are many private lawyers, brokers, stock dealers and real estate agents who occasionally carry on in a professional way correspondence with non-resident patients, clients or patients and as a result of this correspondence it might happen that an investment would be entered into that would result in the transmission of property or the making of contracts. But we can hardly believe that nearly everyone in one State occasionally writes a letter to a person in another State, that may result in being the transmission of a contract between the parties or the exchange of commodities, he can be said to be engaged in interstate commerce in the sense that he would be exempt from license taxes imposed upon every person engaged in a similar trade or occupation. Our constitution authorizes the State and each of the towns and cities to impose a license tax on all trades and occupations, and under this power the State in many instances and nearly all of the towns and cities have imposed a license tax on lawyers, physicians, real estate agents and many other trades and occupations. Now, is it to be said

that a provision in a contract between the parties or the exchange of commodities, he can be said to be engaged in interstate commerce in the sense that he would be exempt from license taxes imposed upon every person engaged in a similar trade or occupation. Our constitution authorizes the State and each of the towns and cities to impose a license tax on all trades and occupations, and under this power the State in many instances and nearly all of the towns and cities have imposed a license tax on lawyers, physicians, real estate agents and many other trades and occupations. Now, is it to be said

that a physician who can show that he is treating by correspondence a patient in Indiana, although he does not send him any medicine, is to be exempt from the license tax exacted from all other physicians in the State whose business is confined to the limits of the State? Is a lawyer practicing in this State but who occasionally has litigation or business in another State that requires correspondence between himself and his clients and other parties to be free from the burden that is imposed on other lawyers who practice exclusively in the courts of this State? Illustrations like these might be multiplied beyond number, but the ones we have mentioned are sufficient to make it manifest that if the commerce clause is extended to reach this class of persons, it will be a serious obstacle in the way of the State and its municipal sub-divisions in the collection of revenue, and result in the imposition of many unequal burdens in the way of taxation.

For the reasons indicated, the appellant not being protected by the commerce clause of the Federal constitution must pay the tax imposed and the judgment is affirmed.

Whole Court sitting. Chief Justice Barker dissenting.

Allen D. Cole for Appellant.

James Breathitt, Attorney General.

T. B. McGregor, Asst. Atty. Gen'l. for Appellee.

13. It is to be remembered that on the 21st day of January, 1914, there was filed in the office of the Clerk of the Court of Appeals Petition for Writ of Error and which is hereto attached and is as follows:

14. Court of Appeals of Kentucky.

The United States Fidelity & Guaranty Company of Baltimore, Md., a corporation, Appellant,

vs.

Commonwealth of Kentucky, Appellee.

Petition for Writ of Error.

Comes now the above named The United States Fidelity & Guaranty Company of Baltimore, Md., a corporation, appellant, and says that on the 9th day of June A. D. 1910 judgment in this case was entered by this Court against The United States Fidelity & Guaranty Company of Baltimore, Md., a corporation, and that thirty days thereafter no petition for rehearing having been filed, said judgment became final; that said corporation was and is aggrieved of that, in said judgment and the proceedings had prior thereto in this case, certain errors were committed to its prejudice, that this is a criminal proceeding by indictment brought under Section 4224, Kentucky Statutes requiring certain reporting agencies to take out a license and pay a tax, and from the application of which Statute, the said corporation claims exemption, and that by this action there was drawn in question the construction of said Statute in relation to

Art. I, Sec. 8 Sub-Sec. 3 of the Constitution of the United States; and the decision of this court is against the right, title and immunity claimed by the said appellant corporation under the commerce clause of the Constitution of the United States, and, as appellant believes, contrary thereto, all of which will more fully appear in detail from the assignment of errors filed herein.

Wherefore The United States Fidelity & Guaranty Company of Baltimore, Md., a corporation, prays that a writ of error may issue to the said Court of Appeals for the correcting of the errors complained of, and that a duly authenticated transcript of the record, proceedings and papers herein may be sent to the United States Supreme Court.

ALLAN D. COLE,
Atty for The United States Fidelity &
Guaranty Company, etc.

(Endorsed.) Filed Jan. 21, 1911. Napier Adams, C. C. A.

16. And on said date there was filed in the office of the Clerk of the Court of Appeals, Assignments of Errors, and which is hereto attached and is as follows:

17. Supreme Court of the United States.

THE UNITED STATES FIDELITY & GUARANTY COMPANY OF BALTIMORE, MD., a Corporation, Plaintiff in Error,

VS.
COMMONWEALTH OF KENTUCKY, Defendant in Error.

Assignment of Errors.

Comes now the U. S. Fidelity & Guaranty Company of Baltimore, Md., a corporation, plaintiff in error in the above entitled cause, and complains of the judgment rendered herein by the Court of Appeals of Kentucky and for errors therein assigns the following:

First. The court erred in affirming the judgment of the Mason Circuit Court, whereas it should have reversed the same with directions to dismiss the proceedings.

Second. The court erred in sustaining the demurrer interposed by appellee and defendant in error to the special plea and answer filed by plaintiff in error in said cause; and in holding and deciding that the facts stated in said plea and answer filed were not sufficient to constitute a defense to the indictment presented against plaintiff in error herein.

Third. The court erred in holding that Section 1224 of the Kentucky Statutes or any part thereof has any application to plaintiff in error.

Fourth. The court erred in not holding so much of Section 1224 of the Kentucky Statutes decided to be applicable to plaintiff in error, to be in conflict with Sec. 8 Sub-Sec. 3 of the Constitution of the United States.

Fifth. The court erred in failing and refusing to give effect to

See, 8 Sub-Sec. 3 of the Constitution of the United States,

48 Sixth. The court erred in holding and deciding that the
functions performed by plaintiff in error, its agents and
servants not to be incidents of interstate commerce.

Seventh. The court erred in holding and deciding the functions
performed by plaintiff in error, its agents and servants, to be only in-
directly and remotely connected with interstate commerce.

Eighth. The court erred in not holding and deciding the func-
tions performed by plaintiff in error, its agents and servants to be
immediately and directly connected with interstate commerce.

Ninth. The court erred in holding and deciding the functions
performed by plaintiff in error, its agents and servants, at Maysville,
Kentucky to be only desultory and occasional; and in assuming that
not more than one letter was exchanged between the agents and
servants of plaintiff in error at Maysville and their non-resident cor-
respondent or correspondents.

Tenth. The court erred in holding and deciding that the cor-
respondence between the agents and servants of plaintiff in error at
Maysville and its non-resident subscribers was not regular or con-
tinuous with any particular persons; and in holding and deciding
such functions so performed by the agents and servants of plaintiff
in error not to be embraced and protected by the interstate com-
merce clause of the Constitution.

Eleventh. That the judgment of the Court of Appeals of Ken-
tucky is contrary to law and the facts as stated in the pleadings in
said cause.

Wherefore, for these and other manifest errors appearing in the
49 record, the said appellant and plaintiff in error, prays that
the judgment of said court be reversed and set aside and held
for naught, and that such directions be given that full force
and efficiency may be given to plaintiff in error by reason of the
special plea and defense set up in its answer filed in said cause.

ALLAN D. COLE,
*Atty for Plaintiff in Error, U. S. Fidelity &
Guaranty Co., of Baltimore, Md.*

[Endorsed.] Filed Jan. 21, 1911. Napier Adams, C. C. A.

50 And on said date there was filed in the office of the Clerk
of the Court of Appeals a Writ of Error from the Supreme
Court of the United States, and order allowing the writ and which
is hereto attached, as follows:

51 UNITED STATES OF AMERICA, *ss.*

The President of the United States, the Honorable the Judges of
the Court of Appeals of the State of Kentucky, Greeting:

Because in the record and proceedings, as also in the rendition of
the judgment of a plea which is in said Court of Appeals of Ken-
tucky, before you, or some of you, at the June sitting of the April

term, 1910, thereof, being the highest court of law or equity of the said State, in which a decision could be had in the said suit between the United States Fidelity & Guaranty Company of Baltimore, Md., designated as defendant and appellant, and the Commonwealth of Kentucky, designated as plaintiff and appellee, wherein was drawn in question the construction of a Statute of Kentucky in relation to Art. I, Sec. 8 Sub. Sec. 3 of the Constitution of the United States, and the decision was in favor of the validity of said Statute and against the right, title, privilege and immunity specially set up and claimed under said clause of the said Constitution; a manifest error hath happened to the great damage of the said, The United States Fidelity & Guaranty Company of Baltimore, Md., as by its complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the party aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

52 Witness, the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, this 21st day of January in the year of our Lord One Thousand Nine Hundred and Eleven.

[Seal 6th Circuit Court, Eastern Ky. Dis., U. S. of America.]

CHAS. N. WIARD,
*Clerk United States Circuit Court,
Eastern Dist. of Ky., at Frankfort.*

Allowed by

J. P. HOBSON,
Chief Justice, Court of Appeals of Kentucky,

[Endorsed.] Filed Jan. 21, 1911. Napier Adams, C. C. A.

53

Court of Appeals of Kentucky.

THE UNITED STATES FIDELITY & GUARANTY COMPANY OF BALTIMORE, MD., a Corporation, Appellant,

vs.

COMMONWEALTH OF KENTUCKY, Appellee.

Alliance of Writ.

Comes now The United States Fidelity & Guaranty Company of Baltimore, Md., a corporation, the appellant above named, on this 21st day of January, A. D. 1911, and files and presents to this court,

its petition, praying for the allowance of a writ of error intended to be urged by it; and praying further that a duly authenticated transcript of the records, proceedings and papers upon which the judgment herein was rendered, may be sent to the Supreme Court of the United States; and that such other and further proceedings may be had in the premises as may be just and proper; and upon consideration of the said petition, this court desiring to give petitioner an opportunity to test in the Supreme Court of the United States, the questions therein presented, it is ordered by this court that a writ of error be allowed, as prayed, provided, however, that said The United States Fidelity & Guaranty Company of Baltimore, Md., appellant, give bond according to law in the sum of \$5000.00, which said bond shall operate as a supersedeas bond.

In testimony whereof, witness my hand this 21st day of January, A. D. 1911.

J. P. HOBSON,
Chief Justice Court of Appeals of Kentucky.

[Endorsed:] Filed Jan. 21, 1911. Napier Adams, C. C. A.

54. And on said date there was filed in the office of the Clerk of the Court of Appeals, a Writ of Error Bond, and which is in words and figures as follows:

55. In the Supreme Court of the United States,

THE UNITED STATES FIDELITY & GUARANTY COMPANY OF BALTIMORE, MD., a Corporation, Plaintiff in Error,

vs.

COMMONWEALTH OF KENTUCKY, Defendant in Error.

Bond on Writ of Error.

Know all men by these presents:

That we, the United States Fidelity & Guaranty Company of Baltimore, Md., a corporation, as principal, and A. D. Cole of the County of Mason, State of Kentucky, as surety, are held and firmly bound unto the above named Commonwealth of Kentucky in the sum of \$5000.00, to be paid to it and for the payment of which, well and truly to be made, we bind ourselves, and each of us, our heirs, executors, administrators and successors, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 21st day of January in the year of our Lord One Thousand Nine Hundred and Eleven.

Whereas, the above named, The United States Fidelity & Guaranty Company of Baltimore, Md., a corporation, plaintiff in error, seeks to prosecute its writ of error in the Supreme Court of the United States to reverse the judgment rendered in the above entitled action by the Court of Appeals of Kentucky.

Now therefore, the condition of this obligation is such that if

56 the above named plaintiff in error shall prosecute its writ of error to effect and answer all costs and damages that may be adjudged, if it shall fail to make good its plea, then this obligation to be void, otherwise to remain in full force and virtue.

THE UNITED STATES FIDELITY &
GUARANTY COMPANY OF BALTI-

MORE, MD., A CORPORATION,

By A. D. COLE, Attorney.

A. D. COLE.

STATE OF KENTUCKY,

County of Franklin, ss:

A. D. Cole, whose name is subscribed as surety to the above bond, having been duly sworn, says that he is a citizen and resident of the State of Kentucky, and is worth more than the sum in said bond specified as the penalty thereof, over and above all his just debts, liabilities, in property not by law exempt from execution in this State.

A. D. COLE.

Subscribed and sworn to before me this 21st day of January, A. D. 1911.

NAPIER ADAMS,
Clerk Court of Appeals, Kentucky.

This bond is approved and allowed as a supersedeas bond this 21 day of January, A. D. 1911.

J. P. HOBSON,
Chief Justice Court of Appeals of Kentucky.

57 And on the same day there was filed in the office of the Clerk of the Court of Appeals, the Original Citation, with proof of service endorsed thereon, and which is hereto attached as follows:

58 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Commonwealth of Kentucky, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, in the District of Columbia, within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the Court of Appeals of the State of Kentucky, wherein the United States Fidelity & Guaranty Company of Baltimore, Md., a corporation, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward D. White, Chief Justice of the

Supreme Court of the United States, this 21st day of January, in the year of our Lord One Thousand Nine Hundred and Eleven.

J. P. HOBSON,
Chief Justice Court Appeals Kentucky.

I, the undersigned attorney of record for the defendant in error of the above entitled cause, hereby acknowledge due service of the above citation and enter an appearance for said defendant in error in the Supreme Court of the United States.

JAS. BREATHITT,
Atty General of Kentucky.

[Endored:] Filed Jan. 21, 1911. Napier Adams, C. C. A.

59 COMMONWEALTH OF KENTUCKY,

The Court of Appeals, ss.

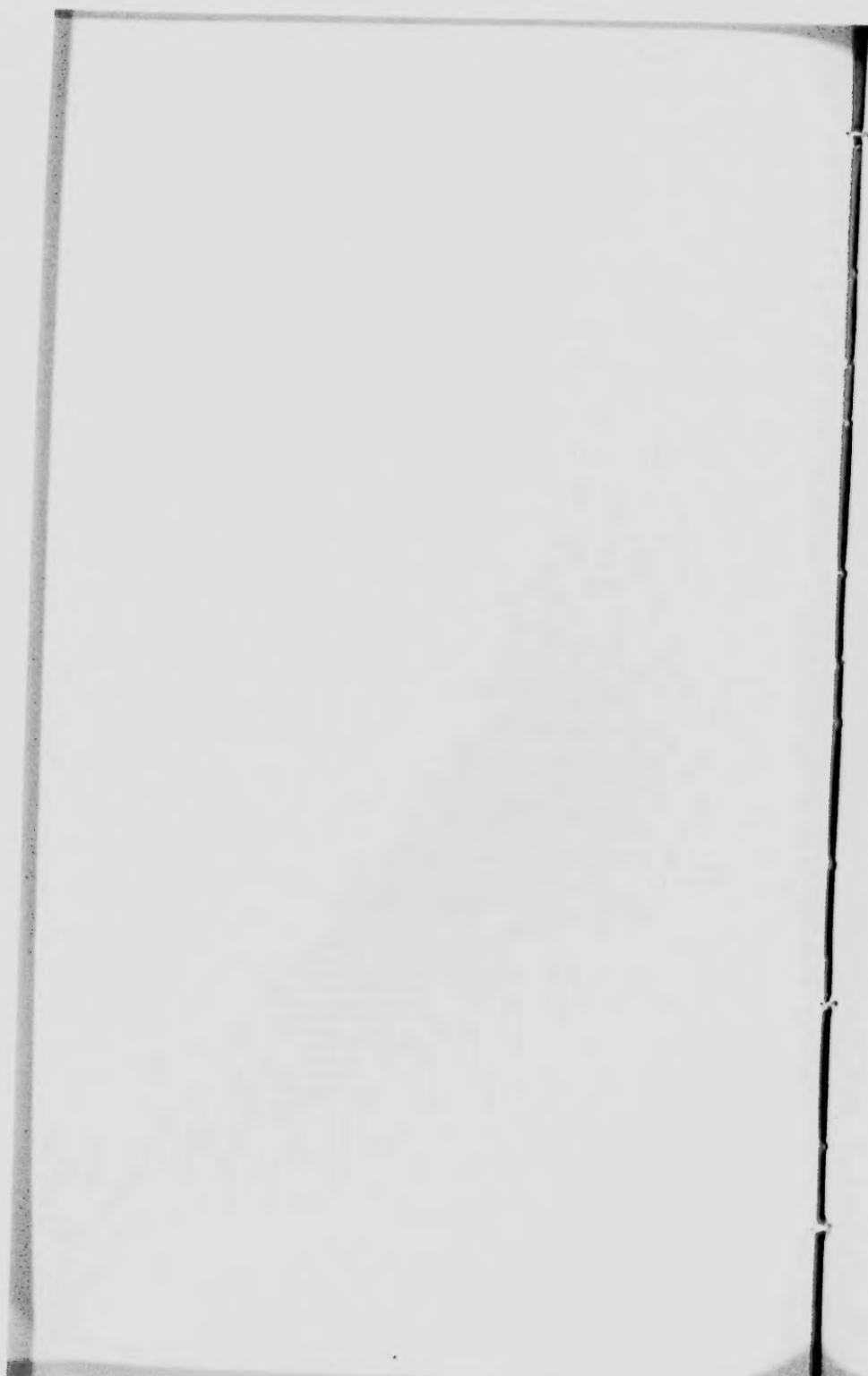
In obedience to the commands of the within Writ of Error I herewith transmit to the Supreme Court of the United States, a duly certified transcript of the complete record and proceedings in the case named in said Writ of Error, with all things concerning same.

In witness whereof, I have hereunto set my hand and affixed the seal of my office. Done at the Capitol in Frankfort, this 6th day of February, 1911.

[Seal Court of Appeals, Kentucky.]

NAPIER ADAMS,
Clerk Court of Appeals of Kentucky.

Endorsed on cover: File No. 22,556. Kentucky Court of Appeals. Term No. 237. The United States Fidelity & Guaranty Company of Baltimore, Maryland, plaintiff in error, vs. The Commonwealth of Kentucky. Filed March 3d, 1911. File No. 22,556.



Office Supreme Court, U. S.
FILED.

NOV 4 1912

JAMES H. MCKENNEY,
CLERK.

Supreme Court of the United States

OCTOBER TERM, 1912

~~██████████~~ No. 237, 26

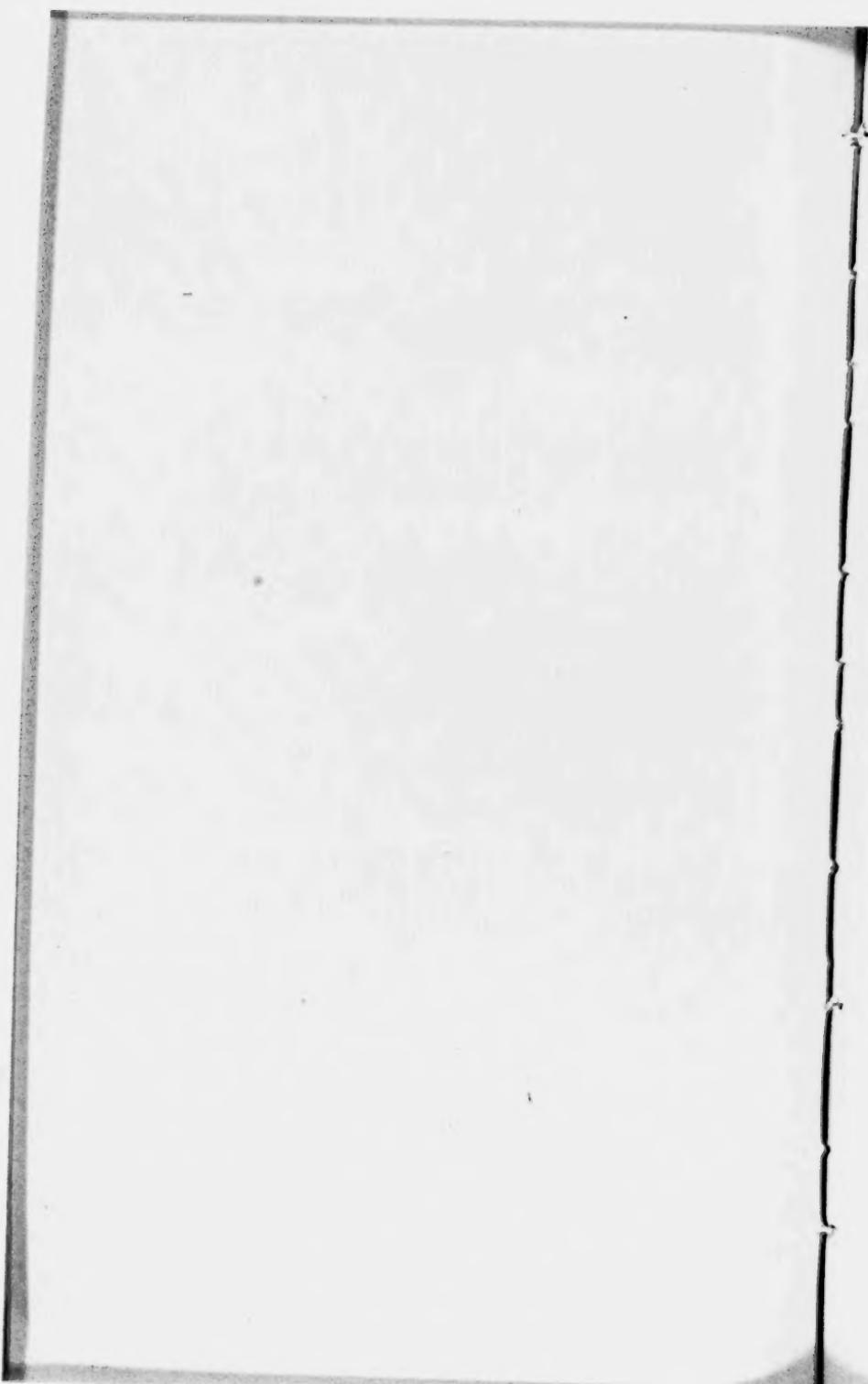
The U. S. Fidelity & Guaranty Co.,
of Baltimore, Md., - - - - Plaintiff in Error,
b.

Commonwealth of Kentucky, - Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR

ALLAN D. COLE,
Counsel for Plaintiff in Error.

W. T. COLE,
Of Counsel.



Supreme Court of the United States

OCTOBER TERM, 1912

NO. 238

The U. S. Fidelity & Guaranty Co.,
of Baltimore, Md., *Plaintiff in Error,*
v.

Commonwealth of Kentucky, . . . *Defendant in Error.*

BRIEF FOR PLAINTIFF IN ERROR

STATEMENT

May it Please the Court:

The plaintiff in error, The U. S. Fidelity & Guaranty Co., of Baltimore, Md., is a corporation, created, organized and existing under the laws of Maryland, and was at all times herein mentioned engaged pursuant to its charter in the publication and distribution of a list of selected attorneys in the United States, which it has for a consideration furnished and still furnishes to business men and merchants throughout the United States to enable them by means of information obtained from said attorneys to transact and carry on business between

the states of this Union. Among other places in conducting its business and in assisting the merchants of the United States to conduct their business, plaintiff in error had designated attorneys at Maysville, Messrs. A. D. Cole and F. P. O'Donnell, who, at all times herein mentioned, received and still receive through the United States mail inquiries from and made reports to merchants residing outside of Kentucky with reference to the financial standing of merchants residing in the city of Maysville, Ky., and Aberdeen, Ohio.

In response to inquiries so received, the reports so furnished to said merchants and business men outside of Kentucky were at all times herein mentioned used by them and are still used by them as an incident to carrying on of their said business and commerce between the states of this Union. Moreover, the *purpose* of the organization of The U. S. Fidelity & Guaranty Co. and the grant of the rights and privileges to it was to enable it to be and become an instrument to assist, promote, facilitate and carry on commerce between states of the Union. Indeed, plaintiff in error has similar representatives in practically every city and town in every state of the Union, as well as in our insular possessions.

In the meanwhile, the Legislature of Kentucky enacted what is known as Section 4224, Kentucky Statutes, which provides in part that, "each and every person, partnership or corporation having representatives in this state, who engage in the business of inquiring into and reporting upon the credit and standing of persons engaged in business in this state, shall pay a license tax of \$100."

Plaintiff in error was indicted in the Mason Circuit Court for failing to pay the license tax created by the statute in question,

and upon a trial under the indictment was fined \$150. To this indictment plaintiff in error not only entered a general plea of not guilty, but also entered a special plea alleging that the Act of the Legislature of Kentucky, pursuant to which said indictment was drawn, is and was in conflict with Section 8, sub-Section 3 of the Constitution of the United States, and that therefore the provisions of said Act as to plaintiff in error are null and void.

The Mason Circuit Court sustained a demurrer to the plea and entered judgment for a fine of \$150; which judgment was affirmed by the Court of Appeals of Kentucky. Whereupon, plaintiff in error sued out a writ of error to this court.

ASSIGNMENT OF ERRORS

Comes now The U. S. Fidelity & Guaranty Company, of Baltimore, Md., a corporation, plaintiff in error in the above-entitled cause, and complains of the judgment rendered herein by the Court of Appeals of Kentucky, and for errors therein assigns the following:

First.—The court erred in affirming the judgment of the Mason Circuit Court, whereas it should have reversed the same with directions to dismiss the proceedings.

Second.—The court erred in sustaining the demurrer interposed by appellee and defendant in error to the special plea and answer filed by plaintiff in error in said cause; and in holding and deciding that the facts stated in said plea and answer filed were not sufficient to constitute a defense to the indictment presented against plaintiff in error herein.

Third.—The court erred in holding that Section 4224 of the Kentucky Statutes or any part thereof has any application to plaintiff in error.

Fourth.—The court erred in not holding so much of Section 4224 of the Kentucky Statutes decided to be applicable to plaintiff in error to be in conflict with Section 8, sub-Section 3 of the Constitution of the United States.

Fifth.—The court erred in failing and refusing to give effect to Section 8, sub-Section 3 of the Constitution of the United States.

Sixth.—The court erred in holding and deciding that the functions performed by plaintiff in error, its agents and servants not to be incidents of interstate commerce.

Seventh.—The court erred in holding and deciding the functions performed by plaintiff in error, its agents and servants, to be only indirectly and remotely connected with interstate commerce.

Eighth.—The court erred in not holding and deciding the functions performed by plaintiff in error, its agents and servants, to be immediately and directly connected with interstate commerce.

Ninth.—The court erred in holding and deciding the functions performed by plaintiff in error, its agents and servants, at Maysville, Kentucky, to be only desultory and occasional; and in assuming that not more than one letter was exchanged between agents and servants of plaintiff in error at Maysville and their non-resident correspondent or correspondents.

Tenth.—The court erred in holding and deciding that the correspondence between the agents and servants of plaintiff in error at Maysville and its non-resident subscribers was not regular or continuous with any particular persons; and in holding and deciding such functions so performed by the agents and servants of plaintiff in error not to be embraced and protected by the interstate commerce clause of the Constitution.

Eleventh.—That the judgment of the Court of Appeals of Kentucky is contrary to law and the facts as stated in the pleadings of said cause.

Wherefore, for these and other manifest errors appearing in the record, the said appellant and plaintiff in error, prays that the judgment of said court be reversed and set aside and held for naught, and that such directions be given that full force and efficiency may inure to plaintiff in error by reason of the special plea and defense set up in its answer filed in said cause.

ALLAN D. COLE,
Attorney for Plaintiff in Error,
U. S. Fidelity & Guaranty Co., of Baltimore, Md.

ARGUMENT

I

KENTUCKY STATUTES, SECTION 4224, CONFLICTS WITH SECTION 8, SUB-SECTION 3 OF THE CONSTITUTION OF THE UNITED STATES.

The admitted facts recited in the opinion of the Court of Appeals herein,—*139 Ky., 38,*—show that The U. S. Fidelity & Guaranty Co., in contracting with the merchants of the United States to furnish them information upon the receipt of which articles of commerce are shipped or withheld, thereby became an agent of each merchant and an employe to perform a particular function, at least as important as any other connected with the conduct of the merchant's business. The representatives in each city and town, designated to represent and do the work of plaintiff in error in that locality thereby become the joint agents of plaintiff in error and of the merchants.

These representatives, in other words, agree with plaintiff in error, for a consideration, to convey information through the United States mails or otherwise to merchants in any part of the country engaged in interstate commerce, and to render them the same service as if employed primarily by the merchants themselves. Being agents, then, of merchants engaged in interstate commerce to furnish them information through the mails or by telephone or telegraph, as a result of which articles of commerce are transported or withheld; is such service rendered by plaintiff in error so connected with the act of interstate commerce as to preclude the State of Kentucky from enacting a statute imposing a license tax, which it is conceivable might effectually prevent plaintiff in error from operating in Kentucky, and thus destroy an incident of interstate commerce?

In the case of *Mondou v. New York, N. H. & H. Co.*, decided Jan. 15, 1912, *Advance Sheets*, page 174, it is said:

"The act of interstate commerce is done by the labor of men and with the help of things; and these men and things are the agents and instruments of the commerce. If the agents or instruments are destroyed while they are doing the act, commerce is stopped; if the agents or instruments are interrupted, commerce is interrupted; if the agents or instruments are not of the right kind or quality, commerce in consequence becomes slow or costly or unsafe, or otherwise inefficient; and if the conditions under which the agents or instruments do the work of commerce are wrong or disadvantageous, those bad conditions may be and often will prevent or interrupt the act of commerce or make it less expeditious, less reliable, less economical and less secure."

But says the Court of Appeals of Kentucky, *139 Ky.*, 39, as follows:

"That indirectly, remotely, or incidentally the person may have had some *minor* part in the importation of goods may be conceded; but this is not sufficient. They must have some immediate or direct connection with the transportation of goods from one state to another."

Now, can a more direct connection with interstate commerce, it is submitted, be conceived than that of plaintiff in error, by its representatives, in furnishing information through the United States mails, or by telephone or telegraph, as the emergency may require, as a result of which information commerce either goes forward from one state to another or remains in the hands of the merchant unsold?

In the case of *McCall v. People of the State of California*, 136 U. S., 104, this court said:

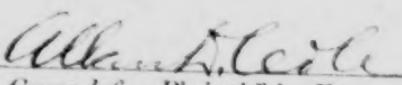
"The reply to this proposition is, that the *essentiality* of the business of plaintiff in error and the commerce of the road he represented is not the test as to whether that business was a part of interstate commerce. * * * The test is, Was this business a *part* of the business of the road? Did it *assist*, or was it carried on with the *purpose* to assist, in increasing the amount of passenger traffic on the road? If it did the power to tax it involves the lessening of the commerce of the road to an extent and commensurate with the amount of business done by the agent."

In the case of *International Text Book Co. v. Pigg*, 217 U. S., 91, wherein were discussed the principles involved in this case, but wherein a license tax was not imposed, it is, on page 111, said:

"The effect of such requirement is practically the same as if the former license was required as a condition precedent to the right to do such business, and in either case it imposes a *condition* upon a corporation of another state, in order to do business in Kansas, which, in the case of interstate business, is a regulation of interstate commerce and directly burdens such commerce. The state cannot thus burden interstate commerce. It follows that the particular clause of Sec. 1283, requiring that 'statement' is illegal and void."

For the foregoing reasons it is earnestly insisted that the judgment of the Court of Appeals of Kentucky, affirming the judgment of the Mason Circuit Court herein, is erroneous and should be reversed.

Respectfully submitted,



W. T. Cole
Counsel for Plaintiff in Error.

W. T. COLE,
Of Counsel.

12
No. 237. 26

Supreme Court of the United States

OCTOBER TERM, 1912

No. 237

Office Supreme Court, U. S.
FILED.

DEC 20 1912

JAMES H. MCKENNEY

CLERK

THE UNITED STATES FIDELITY AND
GUARANTY COMPANY OF
BALTIMORE, MARYLAND

Plaintiff in Error

VERSUS

THE COMMONWEALTH
OF KENTUCKY

Defendant in Error

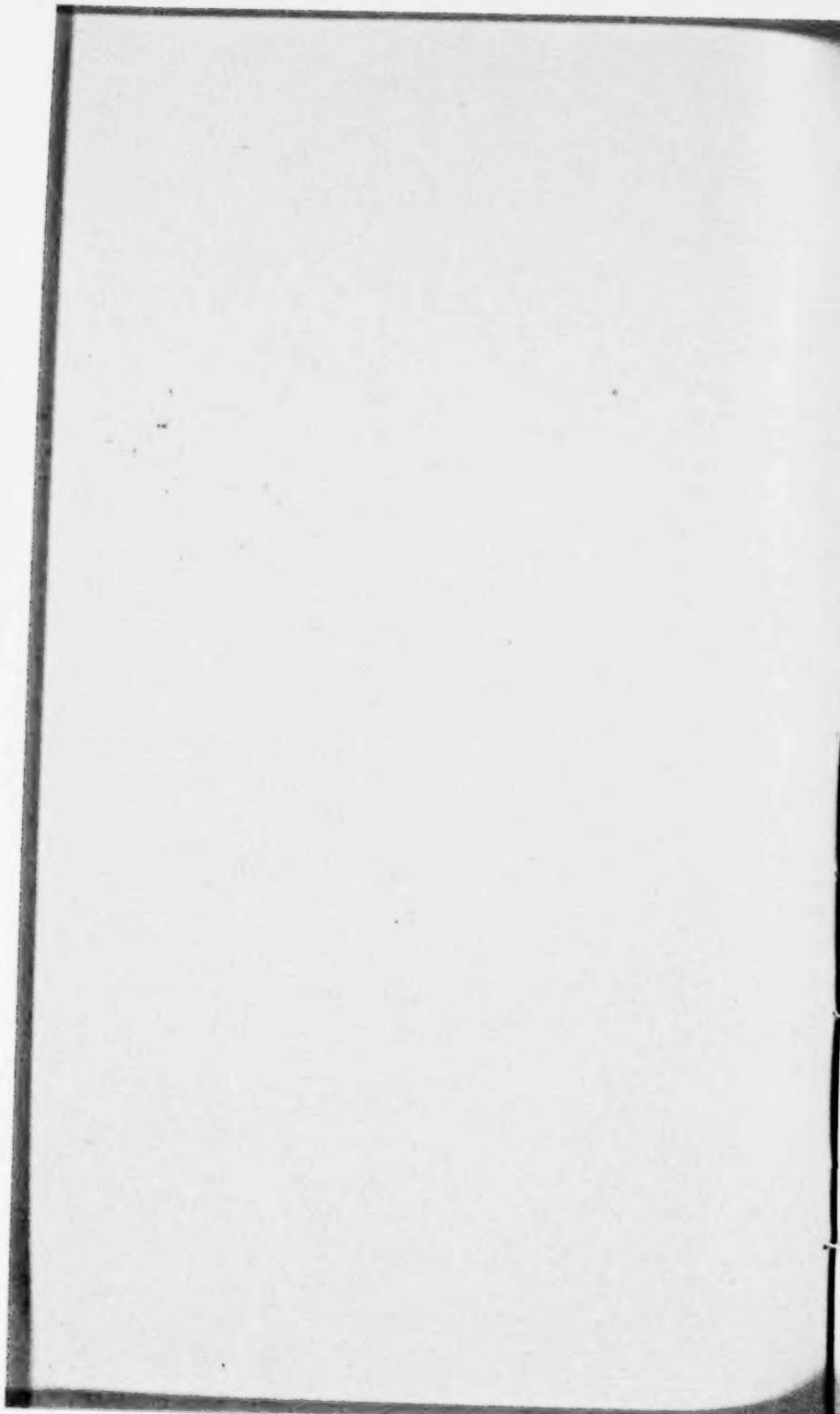
Brief for Defendant in Error

JAMES GARNETT, Attorney General

D. O. MYATT, Assistant Attorney General

Counsel for Defendant in Error

The Kentucky State Journal Pub. Co.
Frankfort, Ky.



INDEX AND AUTHORITIES.

| | Page |
|---|------|
| Caption | 1 |
| Statement of Case | 1 |
| State Statute | 1 |
| Special Plea and Answer | 2 |
| Statement of Facts | 3 |
| Argument | 6 |
| Authorities Cited: | |
| <i>Ficklen v. Taxing District of Shelby County, Tenn., 145 U. S., 1</i> | 9 |
| <i>Henry Hopkins v. United States, 181 U. S., 578</i> | 11 |
| <i>International Text Book Co. v. Pigg, 217 U. S., 91</i> | 6 |
| <i>McCall v. People of the State of California, 136 U. S., 104</i> | 6 |
| <i>Mondou v. New York, N. H. & H. R. Co., 123 U. S., 1</i> | 6 |
| <i>People v. Reardon, 184 N. Y., 431</i> | 12 |
| <i>Stockard v. Morgan, 185 U. S., 27</i> | 12 |
| <i>Ware & Leland v. Mobile County, 209 U. S., 404</i> | 7 |
| Conclusion | 13 |



Supreme Court of The United States

OCTOBER TERM, 1912.

NO. 238.

THE UNITED STATES FIDELITY AND
GUARANTY COMPANY OF BALTI-
MORE, MARYLAND, *Plaintiff in Error,*
v.

THE COMMONWEALTH OF KEN-
TUCKY, *Defendant in Error,*

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT.

May it Please the Court:

Section 4224 of Kentucky Statutes (Carroll's Edition, 1909), is in part as follows:

"Before engaging in any occupation or selling any article named in this subdivision or article 12 of this act, the person desiring to do so shall procure license and pay the tax thereon as follows:
* * * Each and every person, partnership or corporation having representatives in this State, who engage in the business of inquiring into and reporting upon the credit and standing of persons engaged in business in this State, shall pay a license

tax of one hundred dollars. Any person having such license shall print in his letter head a statement of the fact."

In March, 1909, an indictment was returned into the Mason Circuit Court charging the plaintiff in error, the U. S. Fidelity & Guaranty Company of Baltimore, Maryland, "of the offense of having and keeping representatives in this State engaged in the business of inquiring into and reporting upon the credit and standing of persons engaged in business in this State, without license so to do."

Plaintiff in error filed its special plea and answer to said indictment, which is as follows:

"Not waiving either its general demurrer or its general plea of not guilty, the defendant, the U. S. Fidelity and Guaranty Co., for special plea and answer to the indictment herein, states that it is a corporation created, organized and existing under and by virtue of the laws of the State of Maryland; that at all times herein mentioned, it has been engaged pursuant to its charter, in the publication and distribution of a list of selected attorneys in the United States which it has for a consideration furnished to business men and merchants throughout the United States to enable them to transact and carry on business between the States of this Union; that under its method of business, its designated attorneys of Maysville, Ky., have through the United States mail, received inquiries from and made report to merchants residing outside this Commonwealth with reference to the financial standing of merchants residing in the city of Maysville and Mason County as well as at Aberdeen, Brown County, Ohio; that the inquiries so received and so furnished to said merchants and business men outside the State of Kentucky have been used by them as an incident to the carrying on of their

said business and commerce between the States of this Union; and that the purpose of the organization of defendant company and the granting of the rights and privileges to it as aforesaid was to enable it to be, and said defendant is now, and was at all times herein mentioned, in fact, an instrument to promote, facilitate and carry on commerce between the States of this Union; and that the offenses for which it has been indicted herein are and were matters and things done by it and its said agents under and pursuant to its said charter in promoting and facilitating commerce between the States of this Union.

"Defendant, therefore, states that the act of the Legislature of Kentucky pursuant to which the indictment herein was drawn is and was in conflict with Sec. 8, Subsec. 3 of the Constitution of the United States, which it now pleads and relies upon in bar of this indictment and that the provisions of said act are, therefore, null and void as to this defendant.

"Wherefore, defendant prays to be sent hence with judgment for its costs and all proper relief."

The defendant in error entered a demurrer to said special plea and answer, which was sustained by the court. Trial was then had, which resulted in a verdict finding plaintiff in error guilty and fixing its penalty at a fine of \$150. An appeal was duly prosecuted to the Court of Appeals and upon the affirmance of said judgment by the Court of Appeals, the plaintiff in error sued out a writ of error to this court.

STATEMENT OF FACTS.

The appellant is a corporation organized under the laws of the State of Maryland, with power to guarantee, indorse, secure payment and punctual performance and

collection of notes, debts, bills of exchange, contracts, bonds, accounts and other evidence of debt, and further authorized to insure the fidelity of any person, partnership, association, corporation or company holding any place or position of trust, or responsibility, or owing any duty, contractual or otherwise, to any person or persons. It issues a publication styled "Guaranteed Attorneys' Quarterly," in which, in consideration of a fee paid to it by attorneys throughout the country, it inserts their names in said quarterlies, and undertakes to guarantee to merchants and other persons sending to these attorneys, claims, that they will promptly and faithfully pay over all money collected. It furnished to merchants and other persons for a consideration its lists of guaranteed attorneys, and provided them with blank forms upon which information, respecting the financial standing of persons with whom they may desire to deal, may be furnished to said guaranteed attorneys.

At Maysville, Mason County, Kentucky, it had as its guaranteed attorneys A. D. Cole, and the witness, F. P. O'Donnell, with whom it had a contract covering the year ending March 31, 1909. By said contract these attorneys obligated themselves to faithfully and truthfully report on the credit and character of merchants or other persons who resided in Mason County, Kentucky, which reports were to be made to plaintiff's subscribers only. Some of said reports to be made to subscribers residing in Kentucky, but most of them to subscribers residing in some other State. The subscriber would send the agent or attorney a blank form of in-

quiry, which when filled out by the attorney, would be returned to the subscriber. The guaranteed attorney's duty was confined exclusively to the making of his report to the merchant subscriber. He was not even permitted to mention to the person about whom the inquiry related, that his standing and credit were being investigated. The only relation that the plaintiff in error bore to commerce, either intrastate, or interstate, consisted in its report to the prospective seller, the financial standing of the prospective buyer. No order for any article of commerce was solicited or secured by plaintiff in error, nor was there at any time any article of commerce in plaintiff's possession, unless the blank form of inquiry or report, amounted to an article of commerce.

Since the acts of the plaintiff in error, are such acts as are contemplated and are intended to be regulated by section 4224 of Kentucky Statutes, as has been decided by the Court of Appeals of Kentucky (118 S. W., 1000), the only question to be determined on the trial of this cause, is: Do the facts show that plaintiff in error was engaged in interstate commerce within the meaning of subsection 3 of section 8 of article 1 of the Constitution of the United States? If they do, section 4224 of Kentucky Statutes is unconstitutional so far as it undertakes to levy an occupation tax against plaintiff in error.

So far as we know, this court has never had before it a case in which the facts were the same as in the case at bar.

ARGUMENT.

In the case of *Mondou v. New York, N. H. & H. R. Company*, reported in 123 U. S., 1, and quoted and relied upon by plaintiff in error in its brief, the court was considering the application of the act of Congress of April 22, 1908 (35 Stat. at L., 65, Chap. 149, U. S. Comp. Stat. Supp., 1909, p. 1171), relating to the liability of common carriers by railroad to their employes in certain cases. The agents and instruments referred to in the opinion of the court related to the men, cars, track and appliances actually used in the conduct of its business as a common carrier of interstate commerce. It has no application to a collateral or remote transaction as is the case at bar.

In the case of *McCall v. People of the State of California*, 136 U. S., 104, cited by plaintiff in error, the court had under consideration an ordinance of the city of San Francisco, California, imposing a license tax upon the agent of a railroad company, whose duty it was to solicit passenger traffic over a road engaged in interstate commerce, and in the case of *International Text Book Company v. Pigg*, 217 U. S., 91, cited by plaintiff in error, the court simply held that "regular and practically continuous intercourse between the text book company located in Pennsylvania and its scholars and agents in Kansas and other states, involving the transportation from one State to another of books, apparatus and papers, useful or necessary in the particular course of study, was such interstate commerce as to fall under the control of Congress. It simply held that the text book company was engaged in interstate com-

meree, and its business as such could not be regulated by State laws. All of the cases cited by plaintiff in error relate to the attempt by the State Legislature to place a burden or restraint upon either the common carrier and its agents, servants or employes, when engaged in interstate commerce, or upon a company engaged in interstate commerce through the sale and distribution of its goods to citizens of the several States. In every case the agent was in the employment of the company engaged in interstate commerce.

Plaintiff in error seeks to bring itself within the protection of the Federal Constitution upon the theory that the merchant who makes inquiry as to the financial standing of persons in Kentucky, does so for the purpose of determining whether he would be safe in extending credit to such person, and in the event of a favorable report, said merchant will ship goods to the resident of Kentucky and thus be engaged in interstate commerce. In other words, it seeks to shelter under the protection of its merchant subscriber who is actually engaged in interstate commerce. We think this relation to interstate commerce is entirely too remote to prevent plaintiff's being regulated by the laws of the several States.

In the case of *Ware & Leland v. Mobile County*, reported in 209 U. S., 404; 52 Law Ed., 855, this court had under consideration a statute of the State of Alabama imposing a license tax upon brokers engaged in buying and selling futures for speculation or on commission, either for themselves or for other persons. In holding that said act was not in conflict with the Federal Constitution, the court said:

"While the general principles applied in these cases are not to be denied, there is a class of cases which hold that contracts between citizens of different States are not subjects of interstate commerce simply because they are negotiated between citizens of different States, or by the agent of a company in another State, where the contract itself is to be completed and carried out wholly within the borders of a State *although such contract incidentally affect interstate commerce.*"

And again, quoting from the same opinion:

"But how stands the present case upon the facts stipulated? The plaintiffs in error are brokers who take orders and transmit them to other States for the purchase and sale of grain or cotton upon speculation. They are, in no just sense, common carriers of messages, as are the telegraph companies. For that part of the transactions, merely speculative and followed by no actual delivery, it cannot be fairly contended that such contracts are the subject of interstate commerce; and concerning such of the contracts for purchases for future delivery as result in actual delivery of the grain or cotton, the stipulated facts show that, when the orders transmitted are received in the foreign State, the property is bought in that State and there held for the purchaser. The transaction was thus closed by a contract completed and executed in the foreign State, although the orders were received from another State. When the delivery was upon a contract of sale made by the broker, the seller was at liberty to acquire the cotton in the market where the delivery was required or elsewhere. He did not contract to ship it from one State to the place of delivery in another State. And though it is stipulated that shipments were made from Alabama to the foreign State in some instances, that was not because of any contractual obligation so to do. In neither class of contracts, for sale or purchase, was there necessarily any movement of commodities in

interstate traffic because of the contracts made by the brokers.

"These contracts are not, therefore, the subjects of interstate commerce any more than in the insurance cases, where the policies are ordered and delivered in another State than that of the residence and office of the company. The delivery, when one was made, was not because of any contract obliging an interstate shipment, and the fact that the purchaser might thereafter transmit the subject-matter of purchase by means of interstate carriage did not make the contracts as made and executed the subjects of interstate commerce."

In *Ficklen v. Taxing District of Shelby County, Tennessee*, 145 U. S., 1, or 36 L. Ed., 601, this court held that an act of the Tennessee Legislature imposing a license or occupation tax upon commercial agents or merchandise brokers, was not in conflict with the Federal Constitution.

The court said:

"In the case at bar the complainants were established and did business in the taxing district as general merchandise brokers, and were taxed as such under section nine of chapter ninety-six of the Tennessee laws of 1881, which embraced a different subject-matter from section sixteen of that chapter. For the year 1887 they paid the \$50 tax charged, gave bond to report their gross commissions at the end of the year, and thereupon received, and throughout the entire year held, a general and unrestricted license to do business as such brokers. They were thereby authorized to do any and all kinds of commission business and became liable to pay the privilege tax in question, which was fixed in part and in part graduated according to the amount of capital invested in the business, or if no capital were invested, by the amount of commissions

received. Although their principals happened during 1887, as to the one party, to be wholly nonresident, and as to the other, largely such, this fact might have been otherwise then and afterwards, as their business was not confined to transactions for nonresidents.

"In the case of Robbins, the tax was held, in effect, not to be a tax on Robbins, but on his principals, while here the tax was clearly levied upon complainants in respect of the general commission business they conducted, and their property engaged therein, or their profits realized therefrom.

"No doubt can be entertained of the right of a State Legislature to tax trades, professions, and occupations, in the absence of inhibition in the State Constitution in that regard, and where a resident citizen engages in general business subject to a particular tax, the fact that the business done chances to consist, for the time being, wholly or partially in negotiating sales between resident and nonresident merchants of goods situated in another State does not necessarily involve the taxation of interstate commerce, forbidden by the Constitution."

And—

"Since a railroad company engaged in interstate commerce is liable to pay an excise tax according to the value of the business done in the State, ascertained as above stated, it is difficult to see why a citizen doing a general business at the place of his domicil should escape payment of his share of the burdens of municipal government because the amount of his tax is arrived at by reference to his profits. This tax is not on the goods or on the proceeds of the goods, nor is it a tax on nonresident merchants; and if it can be said to affect interstate commerce in any way it is incidentally, and so remote as not to amount to a regulation of such commerce."

In *Henry Hopkins v. United States*, 181 U. S., 578; 43 L. Ed., 290, this court in citing with approval the Ficklen case, used the following language:

“To treat as condemned by the act all agreements under which, as a result, the cost of conducting an interstate commercial business may be increased would enlarge the application of the act far beyond the fair meaning of the language used. There must be some direct and immediate effect upon interstate commerce in order to come within the act. The State may levy a tax upon the earnings of a commission merchant which were realized out of the sales of property belonging to nonresidents, and such a tax is not one upon interstate commerce because it affects it only incidentally and remotely, although certainly. *Ficklen v. Shelby County Taxing District*, 145 U. S., 1 (36:601, 4 Inters. Com. Rep., 79). Many agreements suggest themselves which relate only to facilities furnished commerce, or else touch it only in an indirect way, while possibly enhancing the cost of transacting the business, and which at the same time we would not think of as agreements in restraint of interstate trade or commerce. They are agreements which in their effect operate in furtherance and in aid of commerce by providing for it facilities, conveniences, privileges, or services, but which do not directly relate to charges for its transportation, nor to any other form of interstate commerce. To hold all such agreement void would in our judgment improperly extend the act to matters which are not of an interstate commercial nature.” * * *

“In our opinion all these questions should be answered in the negative. The indirect effect of the agreements mentioned might be to enhance the cost of marketing the cattle, but the agreements themselves would not necessarily for that reason be in restraint of interstate trade or commerce. As their effect is either indirect or else they relate to charges for the use of facilities furnished, the agreements instanced would be valid provided the

charges agreed upon were reasonable. The effect upon the commerce spoken of must be direct and proximate."

The contract or agreement that the attorneys, Cole and O'Donnell, had with plaintiff in error obligated them to report on the financial standing of persons residing in Mason County, Kentucky, to the merchant subscribers who resided elsewhere in Kentucky, the same as was required of them to report to nonresident merchant subscribers. In this respect we think the rule announced in the Ficklen case, *supra*, should control in the case at bar. The fact that the bulk of plaintiff's business was with merchants who resided in other States would not exempt it from paying an occupation tax, even if the court should hold that its acts were so directly connected with interstate commerce as to entitle it to the protection of the commerce clause of the Federal Constitution. It maintained an office in this State and part of its business was purely intrastate business. It has been uniformly held that a State statute may regulate intrastate commerce, so it naturally follows that at least part of its business was subject to State regulation. The law does not undertake to levy a tax upon interstate business only, but applies to the general business of "reporting upon the credit and standing of persons engaged in business in this State."

In the case of *People v. Reardon*, 184 N. Y., 431, the Court of Appeals of New York, after distinguishing the Ficklen case, and the case of *Stockard v. Morgan*, 185 U. S., 27, used the following language:

"The cases distinguish, carefully and critically, between direct and remote results and with reason, for the Constitution is not sensitive to clouds on the horizon, but to clouds overhead. In the nature of things every slight and incidental consequence of State action does not constitute State regulation, for this would lead to sad confusion and leave the subject in perpetual doubt. Attention should be paid to the interests of the State as well as those of the nation, and a construction just to both should be adopted. The legislative power of the State should not be shackled, and the commerce clause of the Constitution should not be frittered away by extreme views in either direction. Immaterial, indirect and remote effects should be ignored and substantial results alone considered. As Mr. Justice Peckham recently said: 'The effect upon the commerce spoken of must be direct and proximate.' New York, Etc., R. R. Co. v. Pennsylvania, 158 U. S., 431; 15 Sup. Ct. Rep., 896; 39 L. Ed., 1043. An agreement may in a variety of ways affect interstate commerce, just as State legislation may, and yet, like it, be entirely valid, because the interference produced by the agreement or by the legislation is not direct."

After considering numerous opinions of this court, bearing upon this case, we believe that the acts of plaintiff in error are too remotely, or indirectly related to interstate commerce to entitle it to the relief sought by this writ of error, so we respectfully ask that the judgment of the Court of Appeals of Kentucky be affirmed.

JAMES GARNETT,

Attorney General.

D. O. MYATT,

Assistant Atty. General.

Counsel for Defendant in Error.

UNITED STATES FIDELITY AND GUARANTY
COMPANY OF BALTIMORE *v.* COMMON-
WEALTH OF KENTUCKY.

ERROR TO THE COURT OF APPEALS OF THE STATE OF
KENTUCKY.

No. 26. Argued April 21, 1913.—Decided December 1, 1913.

A State may lay an excise or privilege tax on conducting commercial agencies unless it has the effect of directly violating a Federal right such as burdening interstate commerce. Courts will not interfere with the exercise of the taxing power of a State on the ground that it violates the commerce clause of the Federal Constitution unless it appears that the burden is direct and substantial.

The license tax imposed by § 4224, Kentucky Statutes, 1909, on persons or corporations having representatives in the State engaged in the business of inquiring into and reporting upon the credit and standing of persons engaged in business in the State, is not unconstitutional as a burden on interstate commerce as applied to a non-resident engaged in publishing and distributing a selected list of guaranteed attorneys throughout the United States and having a representative in that State.

In this case *held*, that the service rendered in furnishing a list of guaranteed attorneys did not, except incidentally and fortuitously, affect interstate commerce and that it was within the power of the State to subject the business to a license tax. *Ficklen v. Shelby County*,

231 U. S.

Opinion of the Court.

145 U. S. 1 followed. *International Textbook Co. v. Pigg*, 217 U. S. 91, distinguished.
139 Kentucky, 27, affirmed.

THE facts, which involve the constitutionality under the commerce clause of the Federal Constitution of a license tax imposed by § 4224 of the Kentucky statutes on commercial agencies, as applied to non-resident agencies, are stated in the opinion.

Mr. Allan D. Cole, with whom *Mr. W. T. Cole* was on the brief, for plaintiff in error.

Mr. James Garnett, Attorney General of the State of Kentucky, with whom *Mr. D. O. Myatt* was on the brief, for defendant in error.

MR. JUSTICE PITNEY delivered the opinion of the court.

Section 4224 of the Kentucky statutes (Carroll's ed. 1909) provides as follows:

"Before engaging in any occupation or selling any article named in this subdivision of article 12 of this act, the person desiring to do so shall procure license and pay the tax thereon as follows: . . . Commercial Agencies. Each and every person, partnership or corporation having representatives in this State, who engage in the business of inquiring into and reporting upon the credit and standing of persons engaged in business in this State, shall pay a license tax of one hundred dollars."

Plaintiff in error was indicted for failing to pay the license tax required by this provision, and, upon trial, was convicted and fined. The trial court, and, on appeal, the Court of Appeals of Kentucky (139 Kentucky 27, 39), overruled the contention that the business done by plaintiff in error was interstate commerce, within the meaning